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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JAMES F. CARPENTER,
Petitioner,

v.

CONTINENTAL TRAILWAYS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO.

JAMES F. CARPENTER,
Petitioner,

v.

CONTINENTAL TRAILWAYS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner James F. Carpenter prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered December 18, 1980, in case No. 78-1278, styled James F. Carpenter, Plaintiff-Appellee v. Continental Trailways, Defendant-Appellant (A-8)[1], wherein the Sixth Circuit reversed a Judgment of the United States District Court for the Eastern District of

[1] The abbreviation "A" refers to the appendix to this section.

Tennessee, Northern Division, entered February 1, 1978 (A-20), finding a violation of the Age Discrimination In Employment Act of 1967 against Continental Trailways in Mr. Carpenter's favor.[2]

QUESTIONS PRESENTED

1. Did Trailways *observe* the terms of its retirement plan and thereby entitle itself to the protection of 29 U.S.C. §623(f)(2) by forcing Plaintiff's retirement prior to the stated normal retirement age of 65 where its plan did not expressly provide for either mandatory early retirement or early retirement at Trailways' option; and where Trailways' explanatory literature represented early retirement as an employee's option for his "want" or "need"?

2. Did the Trailways plan constitute a subterfuge under 29 U.S.C. §623(f)(2) where the plan was adopted in 1974, and amended in 1975; and where Trailways distributed informational literature which represented that the employee could elect early retirement, but which failed to state or imply that Trailways could select employees, at its option, for forced early retirement?

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[2] The parties are referred to herein as follows: Petitioner as **Plaintiff** or **Mr. Carpenter**; Continental Trailways as **Trailways** or **Defendant.** The United States District Court for the Eastern District of Tennessee, Northern Division, is referred to herein as **Trial** or **District Court**; and the United States Court of Appeals for the Sixth Circuit as **Sixth Circuit.** **Unless otherwise indicated, all emphasis herein are supplied.**

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
A. IN THE DISTRICT COURT	2
B. IN THE SIXTH CIRCUIT	3
C. THE FACTS	3
REASONS FOR GRANTING THE WRIT	7
I. This Case Presents A Construction of 29 U.S.C. §623 (f)(2) As It Relates To The Question Of Observance Of The Terms Of A Bona Fide Retirement Plan Which Conflicts With The Fourth, Seventh, and Ninth Circuits.	7
II. The Construction Of 29 U.S.C. §623 (f)(2) As It Relates To Retirement Plans With Non-Existent Or Non-Mandatory Early Retirement Provisions Is An Important Question Of Federal Law, Which Was Expressly Reserved In *United Airlines v. McMann*, And Which Should Now Be Addressed By This Court.	10
III. The Sixth Circuit's Interpretation Of What Constitutes Misrepresentation Or Concealment Of The Terms Of A Retirement Plan Conflicts With This Court's Definition Of "Subterfuge" As Stated In *United Airlines v. McMann*.	11
CONCLUSION	14

INDEX TO APPENDIX IN PETITION

Page

APPENDIX A (SIXTH CIRCUIT)

OPINION, DECEMBER 18, 1980 . . . . . A. 1
JUDGMENT, DECEMBER 18, 1980 . . . . . A. 8

APPENDIX B (DISTRICT COURT)

ORDER OVERRULING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, JANUARY 31, 1978 . . . . . A. 9
OPINION, FEBRUARY 1, 1978 . . . . . A. 10
JUDGMENT, FEBRUARY 1, 1978 . . . . . A. 20

APPENDIX C (STATUTES)

29 U.S.C.A.:
Section 621 . . . . . A. 21
Section 623(a) . . . . . A. 22
Section 623(f)(2) . . . . . A. 22

APPENDIX D (TRAILWAYS INFORMATION LITERATURE)

"HIGHLIGHTS OF OUR NEW RETIREMENT PLAN" . . . . . A. 24

"CONTINENTAL TRAILWAYS RETIREMENT PLAN" . . . . . A. 29

TABLE OF AUTHORITIES

Page

Benzel v. Valley National Bank,
___ F.2d ___, 24 FEP Cases 1204
(9th Cir. 1980) 9, 11

Brennan v. Taft Broadcasting Company,
500 F.2d 212 (5th Cir. 1974) 11

Equal Employment Opportunity Commission v. The Baltimore and Ohio Railroad,
632 F.2d 1107 (4th Cir. 1980) 9, 11

Marshall v. Hawaiian Telephone Co.,
575 F.2d 763 (9th Cir. 1978) 3, 7, 8, 9

Minton v. Whirlpool Corp.,
569 F.2d 1012 (7th Cir. 1978) 8

Sexton v. Beatrice Foods Co.,
630 F.2d 478 (7th Cir. 1980) 7, 8, 11, 12

United Airlines v. McMann,
434 U.S. 192 (1977) 3, 9, 10, 11

Zinger v. Blanchette,
549 F.2d 901 (3rd Cir. 1977),
cert. denied, 434 U.S. 1008 (1978) 3, 7, 8

OPINIONS BELOW

The Sixth Circuit's Opinion appears in Appendix A hereto, pages A. 1-7; and it is reported in 635 F.2d 578 (Adv. Op. February 16, 1981).

The District Court's Opinion appears in Appendix B, hereto, pages A. 10-19; and it is reported in 446 F.Supp. 70 (E.D. Tenn., 1978).

JURISDICTION

The Court of Appeals' Judgment reversing the Trial Court was entered December 18, 1980, (A. 8). This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES

The statutory provisions involved are Sections of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621, 623(a), (f)(2)[3] and §623(f)(2) of the Age Discrimination in Employment Act of 1967, as amended (Pub. L. 95-256, §2(a), 92 Stat. 189 (1978)).[4]

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[3] The Age Discrimination in Employment Act is referred to herein as ADEA. All references to the ADEA are to the Act prior to the 1978 Congressional amendments, unless otherwise stated.

[4] The pertinent provision of the original Act and the Act as amended are to be found in Appendix C to this Brief (A. 21-23).

STATEMENT OF THE CASE

A. IN THE DISTRICT COURT

Plaintiff, James F. Carpenter, sued the Defendant, Continental Trailways, in District Court under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, et seq., alleging the Defendant had violated ADEA by forcing his retirement at age 61. The District Court's jurisdiction was invoked under 28 U.S.C. § 1337 and 29 U.S.C. §626(c) (JA 202-204).[5]

Defendant asserted Plaintiff's retirement was voluntary and denied his termination was because of his age. (JA 205-206). Moreover, Defendant asserted by Motion for Summary Judgment (JA 208-209) and at the trial, that even if Plaintiff's retirement had been involuntary, the retirement was pursuant to a bona fide retirement plan and, therefore, protected under 29 U.S.C. §623(f)(2). The District Court, relying on *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977), denied the Motion (A. 9-10) and reaffirmed the denial in its Memorandum Opinion saying Defendant's plan "did not require retirement before 65 or even intimate that such was expected" (A. 9).

Following trial, the Court by Memorandum Opinion dated February 1, 1978, held Plaintiff was "forced to retire" and Plaintiff's "age was a determinative factor in Defendant's decision to force the Plaintiff to retire at age 61. Therefore, Defendant violated the Age Discrimination in Employment Act of 1967" (A. 18). Trailways then appealed to the Sixth Circuit.

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[5] The abbreviation "JA" refers to the printed joint appendix which was filed in the Sixth Circuit.

B. IN THE SIXTH CIRCUIT.

The Sixth Circuit accepted the District Court's findings that Plaintiff was involuntarily retired, but reversed the District Court "because § 4(f)(2) of the Act, prior to the 1978 amendments, allowed such retirements under a bona fide pension plan" (A. 1).

The Court held Plaintiff's forced retirement was in observance of a retirement plan which "permitted retirement *at the option* (emphasis supplied by the Court) of either the employer or the employee at any time after the employee reaches the age of fifty-five" (A. 3). The Court followed *Marshall v. Hawaiian Telephone Co.*, 575 F.2d 763 (9th Cir. 1978), and *Zinger v. Blanchette*, 549 F.2d 901 (3rd Cir. 1977), and held that "for the purpose of the § 4(f)(2) exception no distinction between mandatory and optional early retirement plans is meaningful and that the exception should be extended to apply to an employee such as Carpenter, dismissed at the employer's option" (A. 5).

Finally the Court held that the Trailways plan was not a subterfuge under the McMann definition, *United Airlines, Inc. v. McMann*, supra, because "...we find no evidence that Trailways' retirement plan was adopted in 1974 as a strategem or artifice to evade the requirements of the ADEA" and because "a complete copy of the retirement plan was available to the employees, ..., and there is no evidence that Trailways misrepresented or concealed the terms of the plan" (A. 7).

C. THE FACTS.

1. Plaintiff was retired by Trailways on March 31, 1977, at age 61, after 31 years of service in managerial positions. He had no intention to retire and was aware

that under the Trailways' plan his retirement at age 61 would result in a monthly pension of approximately $400, rather than $900 with retirement at age 65.[6]

2. Trailways' retirement plan was adopted in 1974 and amended in 1975 (JA 11). Plaintiff was given a brochure in 1974 or 1975 entitled "Highlights of Our New Retirement Plan" and this was the only information given on the plan prior to the institution of this suit (JA 11, 30). On the subject of time of retirement, the following is stated in the brochure (A. 26):

> WHEN YOU GET BENEFITS
>
> You can retire with a full normal pension after you reach age 65, or you can retire with a reduced early pension after age 55 and 15 years of service. Should you become totally and permanently disabled after 15 years of service, your pension will start at age 65. Benefits will be based on all the years you couldn't work, as well as those you did.

About a week before trial, Trailways mailed Plaintiff a second and more detailed brochure entitled "Continental Trailways Retirement Plan". This brochure contains the following (A. 32):

> RETIREMENT TIMES
>
> While it's true the longer you work the higher your benefits will be, *you may want--or need--to retire* or leave before your normal retirement date. *For this reason, the Plan offers a number of different retirement possibilities* and pensions, as follows:

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[6] The facts concerning Plaintiff's service with Trailways and the facts upon which the District Court based its finding that age was a factor in his forced retirement are set forth in the District Court's Opinion at A. 10-16.

Normal retirement is the first day of the month on or after your 65th birthday. Pension benefits begin immediately.

Early retirement can be any time after age 55 when you also have 10 years or more of Vesting Service. Pension payments begin at age 65 in the full amount earned to retirement. Or reduced benefits can begin as early as the first day of the month following age 55 by requesting the Retirement Committee for early payment.

Disability retirement can occur if you become totally disabled after you have 10 years of Vesting Service. Pension payments begin at age 65.

You qualify for a *deferred vested pension* if you leave the Company after you have 10 years of Vesting Service but before you are eligible for early retirement. Pension payments begin at age 65, or reduced benefits can begin as early as the first day of the month following age 55 by requesting the Retirement Committee for early payment.

If you *leave* the Company with less than 10 years of Vesting Service, you will not qualify for a pension. But you will receive a lump sum return of your personal Plan contributions, plus interest.

With its Motion for Summary Judgment, Defendant filed a copy of its Plan. The Plan states in part as follows:

A Participant shall be eligible for an Early Retirement Pension if his employment with the Employers is terminated, whether at his own

> option or not, on or after his 55th birthday and before his Normal Retirement Date, provided he has completed ten (10) or more years of Vesting Service. Payment of an Early Retirement Pension shall commence on the Participant's Normal Retirement Date if he is then living.

Plaintiff was never informed that Trailways could force him to take an early retirement. He was never given a copy of the plan itself, nor had he seen a copy. The Sixth Circuit, however, said this (at A. 7):

> There is some dispute in the present case whether Trailways made known and whether Carpenter knew of the employer's early retirement option. A complete copy of the retirement plan was available to the employees, however, and there is no evidence that Trailways misrepresented or concealed the terms of the plan.

Contrary to the above, the evidence is undisputed that Plaintiff was without knowledge of Trailways' claimed early retirement option. The only brochure Plaintiff had before his forced retirement stated the plan was available "for inspection" (A. 28) in Dallas (Plaintiff worked in Knoxville, Tennessee, and later in Los Angeles, California). The Sixth Circuit's statement that there was "no evidence" of misrepresentation inexplicably makes no mention of the language in the brochure, quoted above, which is couched entirely in terms of an employee's option to elect early retirement and says nothing of the employer's option.[7]

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[7] Trailways may contend as it did below that Plaintiff was familiar with the terms of the retirement plan for salaried employees adopted in 1974 because of participation in collective bargaining negotiations in 1970 and 1973 for

(continued on following page)

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A CONSTRUCTION OF 29 U.S.C. § 623(f)(2) AS IT RELATES TO THE QUESTION OF OBSERVANCE OF THE TERMS OF A BONA FIDE RETIREMENT PLAN WHICH CONFLICTS WITH THE FOURTH, SEVENTH AND NINTH CIRCUITS.

The Sixth Circuit in holding that Trailways did "observe" the terms of its retirement plan and was thereby protected by Section 4(f)(2), cited as authority *Zinger v. Blanchette*, 549 F.2d 901 (3rd Cir. 1977), cert. denied, 434 U.S. 1008 (1978), and *Marshall v. Hawaiian Telephone Company*, 575 F.2d 763 (9th Cir. 1978). Neither decision is in accord with recent authority, and even since the decision of the Sixth Circuit herein, the Ninth Circuit has adopted a position at odds with the Sixth Circuit.

The Sixth Circuit's rationale is that the plan permitted early retirement at the option of either the employee or employer. This holding rejected without explanation the District Court's finding that the plan did not "require retirement before 65, or even intimate that such was expected." In so doing the Sixth Circuit not only overlooked the language of the brochures, which at best was misleading, it overlooked as well the Seventh Circuit's decision in *Sexton v. Beatrice Foods*, 630 F.2d 478 (7th Cir. 1980), in which,

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(continued from preceding page)

certain non-salaried employees. Not only were these negotiations prior to the adoption of the retirement plan involved in this case, the retirement plan, for salaried employees, by its terms, had no application to "union employees" or "non-union hourly employees" (A. 30-31). Moreover, terms of the Company's 1970-1973 retirement plan for union employees, to the extent it is referred to in the record, does not appear to have contemplated forced early retirement (JA 181-184).

under parallel circumstances, the opposite conclusion was reached, and the employer's summary judgment was reversed for two reasons. First, the provision in the plan on which the company relied was too broad and vague to be read as giving it the expressed right to force employees to retire before the normal retirement age. The Court stated (p. 489):

> Aside from its obvious purpose to provide financial benefits, one of the paramount purposes of a retirement plan or program is to put employees on notice when they may reasonably expect to be terminated, or retired. Certainly it is a far different thing to retire an employee at age 55 (even with "substantial" benefits) than to allow him the benefit of a regular salary until age 65 and then retire him with (presumably enhanced) "substantial" benefits.

Secondly, even if the plan were clear enough to give employees notice that the company could terminate them prior to their normal retirement age (p. 489):

> the notice would have been rendered insufficient by the company's booklet describing the plan in laymen's language, because it does not mention Beatrice's power to do so. Rather, the booklet states that each employee over 55 who has the requisite seniority may *elect* (emphasis added by the Court) early retirement.

The Seventh Circuit, in *Beatrice Foods*, rightly distinguished *Hawaiian Telephone*, *Zinger*, and its own case of *Minton v. Whirlpool Corporation*, 569 F.2d 1012 (7th Cir. 1978), cited by the Sixth Circuit in its opinion, because in each of those cases the retirement plan contained

explicit language granting the company the right to choose employees for early involuntary retirement.

The Fourth Circuit in *EEOC v. B & O Railroad Company*, 632 F.2d 1107 (4th Cir. 1980), likewise reversed a grant of summary judgment based on a §4(f)(2) defense. The Court held B & O did not observe the terms of its retirement plan, in forcing involuntary retirement, because the plan contained no language allowing it to do so.

As stated earlier, the Sixth Circuit in determining Trailways did "observe" the terms of its retirement plan cited the Ninth Circuit decision in *Marshall v. Hawaiian Telephone Company*, supra. However, in the latest Ninth Circuit case to address this question, *Benzel v. Valley National Bank*, ___ F.2d ___, 24 FEP Cases 1204 (9th Cir. 1980), because the Company's retirement plan did not contain a provision for involuntary retirement, the Ninth Circuit reversed a grant of summary judgment that had been made under §4(f)(2). After reviewing the recent cases on this point including *United Airlines v. McMann*, supra, the Court said (at p. 1205):

> The Courts of Appeals for the Fourth and Seventh Circuits ... have considered this contention and have held that former §4(f)(2) does not afford an exemption to ADEA where as here the retirement plan does not contain a provision for involuntary retirement. It is made clear in the 1978 amendments to ADEA that it was not the intent of Congress to afford such an exemption, even when expressly provided for in the plan. We join in concluding that McMann should not be extended to apply to plans not containing a provision for involuntary retirement.

These decisions from the Fourth, Seventh, and Ninth Circuits are in conflict with the expansive view expressed by the Sixth Circuit on §4(f)(2) and with the approach and reasoning expressed by the Sixth Circuit in concluding the retirement plan at issue, contrary to the implications of the explanations given, gave the employer the right to enforce early retirement. The manifest conflict on this issue of broad social importance warrants the consideration of this Court.

II. THE CONSTRUCTION OF 29 U.S.C. § 623(f)(2) AS IT RELATES TO RETIREMENT PLANS WITH NON-EXISTENT OR NON-MANDATORY EARLY RETIREMENT PROVISIONS IS AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH WAS EXPRESSLY RESERVED IN *UNITED AIRLINES V. McMANN*, AND WHICH SHOULD NOW BE ADDRESSED BY THIS COURT.

The Sixth Circuit's declaration that "We agree with Judge Weis's opinion for the Third Circuit in *Zinger* that Congress revealed no intent to distinguish between optional and mandatory retirement provisions" (A. 5), extended this Court's ruling in *McMann* to apply to non-mandatory involuntary retirement provisions. This Court, however, expressly reserved decision on whether involuntary retirement before age 65 is unlawful in the absence of a mandatory retirement provision. The District Court rejected Trailways attempt to sanction its forced retirement of Plaintiff under the ruling in *McMann*. Likewise, the Fourth, Seventh, and Ninth Circuits have rejected the unwarranted extension of the *McMann* ruling to provide protection to employers forcing early retirements on the basis of non-existent, implied, or non-mandatory early

retirement provisions. See *EEOC v. B & O Railroad Co.*, supra, *Sexton v. Beatrice Foods Company*, supra, and *Benzel v. Valley National Bank, supra.*

The Sixth Circuit's expansive holding collides with the stated Congressional findings and purpose in the enactment of the ADEA as set forth in 29 U.S.C. §621 (A. 21). Furthermore, the Sixth Circuit's holding conflicts with the actions of Congress in amending §623(f)(2) in April, 1978, (A. 23). Congress in enacting the amendment rejected in the most emphatic terms the decisions in *Zinger* and *Brennan v. Taft Broadcasting Company*, 500 F.2d 212 (5th Cir. 1974). The Fourth, Seventh, and Ninth Circuits, contrary to the Third, Fifth, and Sixth, have narrowly construed §4(f)(2), and, likewise, have narrowly applied the *McMann* decision. In order to resolve this present conflict among the Circuits and insure uniform application of the ADEA in the pending cases, the Court's guidance is essential, and this need should impel issuance of the writ.

III. THE SIXTH CIRCUIT'S INTERPRETATION OF WHAT CONSTITUTES MISREPRESENTATION OR CONCEALMENT OF THE TERMS OF A RETIREMENT PLAN CONFLICTS WITH THIS COURT'S DEFINITION OF "SUBTERFUGE" AS STATED IN *UNITED AIRLINES V. McMANN.*

The Sixth Circuit held that the Trailways Plan was not a subterfuge. In so holding, the Sixth Circuit quoted the *McMann* definition of "subterfuge":

> In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, strategem, or artifice of evasion. In the context of this statute, 'subterfuge' must be given its ordinary meaning ... 434 U.S. at 203 (A. 6).

The Court stated that although the Trailways plan should undergo more thorough scrutiny since it was enacted after the ADEA, it found no evidence that the plan was adopted as a strategem to evade the requirements of the Act (A. 6). The Court stated further that:

> There is some dispute in the present case whether Trailways made known and whether Carpenter knew of the employer's early retirement option. A complete copy of the retirement plan was available to the employees, however, and there is no evidence that Trailways misrepresented or concealed the terms of the plan (A. 7).

The Sixth Circuit's holding with regard to no misrepresentation or concealment simply ignores the evidence presented in this case. The plain language of both the first informational brochure and in the second and more detailed brochure, set forth in our Statement of Facts, can only be construed to mean early retirement was an employee's option. Indeed, the second brochure states explicitly that an employee's "want" or "need" for early retirement was the reason for "different retirement options"--none of which included expressly or by implication the employer's right to force early retirement. This fact is undisputed and unexplained, as is Plaintiff's testimony that "no one had any knowledge, nor was there any information in any of the brochures or pamphlets that would have been put out, that led anyone to believe that they would be terminated prior to, or involuntarily terminated prior to the age of 65" (JA 37).

As the Seventh Circuit stated in *Sexton v. Beatrice Foods Company*, *supra* at page 489:

> Far more than the niceties of draftsmanship are involved in the requirement that the right of the employer to force retirement be expressly included in the plan itself.... In addition an employee having realistic notice that he may face early retirement may have an opportunity to make provisions through savings, through the securing of a second job, and otherwise for the contingencies which he faces. Fair notice, consistency and the absence of discrimination are the touchstones of policy in this area.

The Sixth Circuit simply did not deal with the question of misrepresentation by Trailways. It is no answer to say that Plaintiff could have gone to Dallas or Timbuktu and have read the detailed plan. The employee world simply does not work that way and it will be a sad day when and if it is compelled to do so or suffer the consequences. In any event, the detailed plan is not all that clear. Furthermore, an employee has the right to assume his employer's written summaries of the retirement plan accurately state the material provisions of that important benefit. The right to compel involuntary retirement and thereby effect a retired status with but a fraction of the benefit the employee had reason to believe he would receive upon "normal" retirement, is a material provision by any standard. The reference to the right in the plan itself (see herein at p. 6) is interpretive and obscure at best, and is found not at all in the explanatory bulletins which were given general distribution.

The Seventh Circuit said in *Beatrice Foods* that fair notice is a touchstone of policy in this area. To find an employer protected by Section 4(f)(2) under the circumstances of this case is repugnant to that policy.

CONCLUSION

For the reasons assigned, Petitioner prays that the Petition for Writ of Certiorari should be granted and that the Writ issue to review the Decision and Judgment of United States Court of Appeals for the Sixth Circuit, entered in Case No. 78-1278 on December 18, 1980.

Respectfully submitted,

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March 16, 1981

APPENDIX A

NO. 78-1278

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES F. CARPENTER,
Plaintiff-Appellee,

v.

CONTINENTAL TRAILWAYS,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed December 18, 1980

Before: ENGEL, MERRITT and MARTIN, Circuit Judges.

MERRIT, Circuit Judge. The issue in this case is whether Carpenter's forced retirement under a pension plan at age sixty-one after thirty-one years of service with Continental Trailways violates the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.* ("ADEA" or "the Act"). After a bench trial the District Court held that Trailways violated the Act when it retired Carpenter because of his age. 446 F.Supp. 70 (E.D. Tenn. 1978). We reverse because §4(f)(2) of the Act, prior to the 1978 amendments, allowed such retirements under a bona fide pension plan.

Appendix A - C.A. 6 Opinion

I.

Carpenter began working in 1946 for an independent company later acquired by Trailways. Since that time he worked in managerial positions for Trailways in Tennessee and the Los Angeles area. Carpenter received commendations for his work and was never reprimanded, and all but one of his trans-

[2]

fers were promotions to higher status positions. In 1976 he was appointed Los Angeles Area General Manager, and later that year he received a favorable evaluation from his superior, a Regional Senior Vice President, who stated that Carpenter was capable of immediate promotion to assume that position. Trailways, however, was experiencing serious financial difficulties, and in February 1977 the new President announced a reorganization of the company that would reduce the number of managerial positions. The eighteen positions at Carpenters' level nationwide were reduced to nine, and the four Regional Senior Vice President positions were reduced to two. Seven middle and upper level management employees in the western region were involuntarily retired; others were found new positions within Trailways. All of the seven retirees were between sixty and sixty-five years of age. Carpenter, then sixty-one years old, was notified that he was one of the persons sacrificed by the consolidation of managerial jobs, and that he would be retired as of March 31, 1977. The parties dispute whether Carpenter expressed interest in finding alternate employment with Trailways. The District Court found that he was interested in continued employment but that Trailways failed to offer him real alternatives. After weighing the evidence, the district court also found that Carpenter was involuntarily retired by Trailways. These findings by the court below are not clearly erroneous, and we accept them.

II.

Trailways' summary judgment motion is based upon §4(f)(2) of the ADEA, 29 U.S.C. §623(f)(2), which presents an exception to the prohibitions stated in §§4(a)-(e).[1] Section 4(f)(2), before amendment in 1978, reads as follows:

[3]

> It shall not be unlawful for an employer ... to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter . . . .

Congress enacted this broad exception with the expressed intention of revising it as necessary following studies commissioned after enactment of the ADEA in 1967.

Carpenter was retired pursuant to a retirement plan enacted in 1974, which permitted retirement *at the option* of either the employer or the employee at any time after the employee reaches the age of fifty-five. Trailways relies upon the Supreme Court decision in *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977), which held that the ADEA did not prohibit early retirement pursuant to a mandatory retirement provision in a bona fide plan, even if age is the sole basis for early retirement.

---

[1] The language of sections (a), (b), and (c) parallels that of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-e2(a), (b), and (c). Section 4(a) of the ADEA makes it unlawful for an employer to discharge or fail to hire a person, or to discriminate with respect to compensation or conditions of employment, or to classify or segregate an employee in a manner that would deprive him of employment opportunities, because of that person's age. Sections (b) and (c) similarly forbid discrimination or segregation because of age on the part of employment agencies and labor organizations. Section (d) protects from discrimination any person who has opposed a practice made unlawful by the Act. Finally, section (e) forbids publication of any notice or advertisement relating to employment that indicates a preference or limitation based upon age.

The *McMann* decision was overruled by the 1978 amendment to the ADEA, which, *inter alia*, added the following clause to §4(f(2): "and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual . . . ." *See* Sen. Rep. No. 95-493, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 504, 512-13. An initial question confronting this court is whether the amendment should be applied retroactively to the case before us. We are convinced by the thorough discussions in *Marshall v. Atlantic Container Line*, 18 FEP Cas. 1167 (S.D. N.Y. 1978), and

[4]

Marshall v. Baltimore & Ohio R. Co., 461 F.Supp. 362 (D.Md. 1978), that the Congressional intent in enacting the 1978 amendments and the judicial doctrines concerning retroactivity militate against the retroactive application of amended §4(f)(2). We therefore apply the law as it stood when this controversy arose.

III.

According to §4(f)(2), an employer must "observe the terms" of a "bona fide . . . plan" that is not "a subterfuge to evade the purposes" of the Act, in order to be exempt from the proscriptions of the ADEA when retiring an employee at an age earlier than that prescribed in the Act. Trailways' retirement plan is bona fide. A plan that exists and pays substantial benefits — as does Trailways' — satisfies this criterion. *McMann*, *supra*, at 194; *Marshall v. Hawaiian Telephone Co.*, 575 F.2d 763, 766 (9th Cir. 1978); *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212, 217 (5th Cir. 1974).

A major question in this appeal is whether this Circuit should follow the Ninth and Third Circuits in *Hawaiian Telephone*, *supra*, and *Zinger v. Blanchette*, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978), which held that for the purpose of the §4(f)(2) exception no distinction between mandatory and optional early retirement plans is meaningful and that the exception should be extended to apply to an employee such as Carpenter, dismissed at the employer's option. The Supreme Court found that the retirement plan in *McMann* mandated early retirement (at the age of sixty) and reserved the question of the legality of early retirement at the employer's option.[2]

[5]

We agree with Judge Weis's opinion for the Third Circuit in *Zinger* that Congress revealed no intent to distinguish between optional and mandatory retirement provisions. Although the Secretary later distinguished optional from mandatory retirement plans, U.S. Dept. of Labor Annual Report on the [ADEA], at 17 (1975), *quoted in Zinger*, *supra*, at 908, no evidence has been presented to persuade us that this distinction informed the original enactment of §4(f)(2). *See Zinger*, *supra*, at 905-09. In retiring Carpenter, Trailways acted as permitted by its retirement plan; it did not violate the provisions of that plan. Therefore, in exercising its option to retire Carpenter, Trailways "observed the terms" of the plan as required under §4(f)(2).

---

[2] The Court stated,

> The Department [of Labor]'s more recent position on . . . section [4(f)(2)] is that pre-65 retirements "are unlawful unless the mandatory retirement provision . . . is required by the terms of the plan and is not optional . . . ." . . . Having concluded . . . that the United plan calls for mandatory retirement at age 60, however, we need not consider this further.

434 U.S. at 197 n. 4.

The final issue is whether Trailways' plan is a subterfuge. Most of the cases discussing this question concerned retirement plans set up prior to the enactment of the ADEA. They held that in such circumstances no subterfuge could exist. *McMann, supra*, at 203; *Minton v. Whirlpool Corp.*, 569 F.2d 1012 (7th Cir. 1978); *Baltimore & Ohio R. Co., supra*, at 374. *But see Zinger, supra*, at 904 (mere fact that plan established prior to enactment of ADEA not sufficient to prove plan not a subterfuge). The retirement plan involved in the present case was set up in 1974, after the enactment of the ADEA. In this situation the plan should undergo more thorough scrutiny to determine whether its early retirement provisions were established to evade the purposes of the Act.

The Supreme Court in *McMann* states the test of "subterfuge": "In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, strategem, or artifice of evasion. In the context of this statute, 'subterfuge' must be given its ordinary meaning . . . ." 434 U.S. at 203. In the present case we find no evidence that Trailways' retirement plan adopted in 1974 as a strategem or artifice to evade the requirements of the ADEA. Rather, it appears to have been adopted for the same reason that many companies and

[6]

governmental agencies have adopted optional retirement plans. Evidence exists that the plan was a legitimate instrument created to provide for the retirement of the company's employees.

Carpenter argues that Trailways' retirement plan cannot be bona fide and was a subterfuge because its early retirement provisions were not explicitly presented in the text of the certain materials circulated to the employees

affected. *See Taft Broadcasting, supra*, at 218-20 (Tuttle, J., dissenting). There is some dispute in the present case whether Trailways made known and whether Carpenter knew of the employer's early retirement option. A complete copy of the retirement plan was available to the employees, however, and there is no evidence that Trailways misrepresented or concealed the terms of the plan.

Having found that Trailways' retirement plan satisfies each of the criteria necessary for exemption under § 4(f)(2), we hold that Carpenter's retirement pursuant to that plan was not in violation of the ADEA. We need not, therefore, reach the question whether there was evidence to support the District Court's finding that age was a determining factor in the decision to retire Carpenter. Accordingly, the judgment of the District Court is reversed.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 78-1278

FILED
DEC 18 1980
John P. Hehman, Clerk

JAMES F. CARPENTER,

Plaintiff-Appellee,

v.

CONTINENTAL TRAILWAYS,

Defendant-Appellant.

Before: ENGEL, MERRITT and MARTIN, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

It is further ordered that Defendant-Appellant recovers from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT.
/s/ JOHN P. HEHMAN
Clerk

Issued as Mandate: January 13, 1981

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

JAN 31 1978

JAMES F. CARPENTER	)	
	)	
v.	)	CIV. 3-77-377
	)	
CONTINENTAL TRAILWAYS	)	

ORDER

Defendant, Continental Trailways, has moved for summary judgment on the ground that its retirement plan is a bona fide plan requiring retirement before age sixty-five, and, because plaintiff voluntarily joined the plan, his retirement pursuant to the plan falls within the exception to the Age Discrimination in Employment Act of 1967, found at 29 U.S.C. §623(f)(2). *See United Air Lines v. McMann*, 46 U.S.L.W. 4043 (U.S. Dec. 12, 1977).

The Court has examined the affidavits submitted by both parties, and the exhibits attached thereto. The Court is convinced that the retirement plan herein is not like that considered in *McMann*, *supra*. It did *not* require

[2]

retirement before sixty-five, or even intimate that such was expected. As a matter of fact, the brochure offered plaintiff states that "normal" retirement age under this plan would be sixty-five.

Accordingly, it is ORDERED that defendant's motion for summary judgment be, and the same hereby is, denied.

Enter:

/s/ ROBT. L. TAYLOR
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

FILED
FEB 1 1978

JAMES F. CARPENTER	)	
	)	
v.	)	CIV. 3-77-377
	)	
CONTINENTAL TRAILWAYS	)	

MEMORANDUM

James F. Carpenter seeks legal and equitable relief, including damages, reinstatement to former employment, back pay, liquidated damages and attorney's fees for alleged discriminatory termination of his employment with the defendant. The action is based upon an alleged violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq*. Jurisdiction is based on Title 28, U.S.C. § 1337 and 29 U.S.C. § 626(c).

Plaintiff contends that after thirty-one years of faithful and competent service with the defendant his services were

terminated on March 31, 1977. He says that he was involuntarily retired because of his age; that his involuntary retirement was part of a pattern of

[2]

discrimination against management officials over forty years of age; and that the Age Discrimination in Employment Act was violated by the defendant in forcing his retirement.

In response to the claims made by the plaintiff, the defendant contends that plaintiff voluntarily left his employment and went into voluntary retirement. Defendant denies that it violated the Age Discrimination in Employment Act in dealing with the plaintiff. Defendant contends that all of its actions with regard to the plaintiff were based upon reasonable factors other than age. Defendant denies that it is guilty of the charge of engaging in a pattern of discrimination against management officials over forty years of age.

Plaintiff's Work Experience with Defendant

Plaintiff has worked in various managerial and executive positions for defendant since he first started in the bus business in February 1946,[1] as a Superintendent in Dallas. Since that job, plaintiff has moved five times, between jobs in California and Tennessee, including a thirteen year period as Assistant General Manager in Los Angeles during the years from 1957 to 1970. With the exception of the plaintiff's transfer in 1952 from the position of Regional Manager at Los Angeles to the position

[1] Plaintiff's first job was actually with an independent bus company later taken over by the defendant. However, for purposes of plaintiff's total years of employment experience with defendant, it has been defendant's policy to treat those initial years as part of plaintiff's experience with the defendant.

[3]

of Regional Manager at Memphis, which transfer was to a position of equal status, each of the transfers experienced by the plaintiff was a promotion to a position of higher status with a commensurate increase in salary. (See Exhibit 10).

From July 1970 through April 1976, plaintiff served as President and General Manager of Tennessee Trailways, Inc., a subsidiary of the defendant, with offices in Knoxville, Tennessee. In this position plaintiff reported directely to the President of Trailways, Hubert L. Glisan. In March of 1976, Mr. Glisan convinced plaintiff to accept a position as Area General Manager in Los Angeles. Glisan was of the opinion that plaintiff's prior experience with the Los Angeles office and his experience with labor problems would help plaintiff handle the difficult assignment. The Los Angeles area had been operating at a loss for a couple of years and it also suffered from labor problems, including pressure from minority groups.

Because of labor negotiations at Tennesse Trailways, plaintiff was asked to remain in Knoxville until those negotiations were completed. In late May, plaintiff moved to Los Angeles to assume his new position as Area General Manager in Los Angeles. This move was considered a promotion and the transfer included a pay raise which totaled $8,700.00, from $24,000.00 a year to $32,700.00 a year. In Los Angeles plaintiff had about sixty salaried employees

[4]

working under him.

Plaintiff began his job in Los Angeles about June 1, 1976. As Los Angeles Area General Manager, he was one of three Area General Managers in the Western Region who reported

directly to Regional Senior Vice President, William F. Aikman. Aikman was one of four Regional Senior Vice Presidents who reported directly to President Glisan.

During plaintiff's entire career with defendant he was never reprimanded, and received many commendations for his work. (*See e.g.*, letter of President Glisan, Exhibit 11). On August 31, 1976, after plaintiff had been on the job in Los Angeles for three months, his Supervisor, Mr. Aikman, filed a written performance appraisal on plaintiff. (Exhibit 3). Under the category of plaintiff's accomplishments wherein he had met or exceeded expected standards, Mr. Aikman listed eleven such areas. Only one area was listed as needing any improvement. Finally, in the space provided on the form to list the employee's potential for promotions, Mr. Aikman stated that he felt the plaintiff was capable of being immediately promoted to the position of Regional Senior Vice President, the position Aikman then held. This may have been a particularly important recommendation, because Aikman himself was already past the retirement age of sixty-five, and it was common knowledge he would soon retire. Also, a summary of appraisals from the Western Region compiled by W. H.

[5]

Edwards in the central personnel office, and dated December 30, 1976, reveals that plaintiff was the only person in the Western Region to be recommended by Aikman for the Regional Senior Vice President's position. (Exhibit 4).

In January of 1977, plaintiff finally sold his home in Knoxville. He had decided to live in an apartment in Los Angeles due to the high cost of housing. While on the job in Los Angeles, plaintiff kept a regular work schedule

of reporting to the office at 6:00 A.M. and staying till around 5:00 P.M., and working occasionally on weekends.

Reorganization of Trailways

On February 1, 1977, Trailways named a new President, Kevin Murphy, 49 years of age and with one year of experience with the Company. Mr. Glisan, age sixty, with thirty-six years of service with Trailways, was moved out as President and made Vice Chairman of the Board. This move was made in an attempt to save the Company from financial calamity. The new President called a meeting of the Vice Presidents on February 13-16, 1977, in Dallas to discuss reorganization of the Company. At that meeting, Aikman learned that his position was to be abolished, and there would only be one vice president for the entire western half of the country, instead of two. Mr. Ben Robinson, age 39, with

[6]

21 years of experience with the Company, who was then Regional Senior Vice President for the Central and Southwestern Region, would now be the Vice President for the entire western United States.

On February 17, 1977, after Mr. Aikman returned to Los Angeles, he told the plaintiff that he was "out." Plaintiff had heard that some changes were under consideration, but he was shocked to hear that he was without a job. Plaintiff asked if he might be considered for another job in the Company and Aikman told him that the City Manager's job in Albuquerque, New Mexico might be offered to him by Mr. Robinson when he came out to Los Angeles. Plaintiff responded that he would like to discuss that possibility as he certainly did not want to retire now because of the severe hardship this would mean in his retirement program.

Plaintiff, if forced into immediate retirement, would receive slightly over $400.00 per month. However, if he could stay with the Company at approximately the same salary until he was sixty-five, which was slightly over three years away, his monthly benefits would more than double, amounting to around $900.00 per month. Mr. Aikman did not have authority to discuss the Albuquerque job with plaintiff as he (Aikman) was on his way out also, and was retired on October 1, 1977 at the age of sixty-eight.

Voluntary or Involuntary Retirement?

In late February, Ben Robinson came to the Los Angeles office to talk to those managerial employees who

[7]

had lost their jobs. Robinson states that during his conversation with plaintiff he started to offer plaintiff another job but that the plaintiff indicated he was not interested. In essence, this would mean that plaintiff voluntarily retired by refusing to accept other employment with Trailways. Mr. Aikman stated that he overheard this conversation and that Robinson made an offer. Plaintiff stated emphatically that Robinson made no other offer to him and that he would have certainly been interested in any such offer as he had a strong desire to remain with the Company until he was sixty-five. Plaintiff was asked to stay on the job until the end of March 1977 due to the upcoming labor negotiations.

In addition to the incentive of substantially increased retirement benefits, plaintiff has offered other evidence to support his argument that he was forced to retire. On his application for retirement benefits, the form, where it states "Date Retired," has plaintiff's handwritten modi-

fication, so that it reads instead "Date I am being retired." (Exhibit 8). Also, on the "pink sheet" form, dated March 31, 1977, indicating plaintiff's severance of employment with Trailways, signed by Mr. Aikman, the reason for termination is typed in as: "Placed on retirement at direction of the Company." (Exhibit 9).

Based on all the evidence and observation of the witnesses, the Court is of the opinion and finds that plaintiff was forced to retire, effective March 31, 1977.

[8]

Violation of the Act

Of course, forced retirement or firing of an employee, in itself, is not a violation of federal law. It is not unusual for companies in the financial position that Trailways found itself in early 1977 to lay off or teminate many employees, as it did, in an attempt to cut expenses. However, under the Age Discrimination in Employment Act of 1967, if an affected employer, in making the decision to fire an employee in the protected age bracket of 40-65 years, even considers as one factor in that decision the employee's age, and if that factor made a difference, then the employer has violated the Act. *See Laugesen v. Anaconda Company*, 510 F.2d 307, 317 (6th Cir. 1975). A finding that age was used as one of the determinative factors in such a decision does not depend on direct evidence of such but may be inferred from a totality of the circumstances. *Id.*, at 314; *King v. International Union*, 443 F.2d 273 (6th Cir. 1971).

Plaintiff was replaced[2] by Mr. Holland, about 42 years of age, who had about twenty years of experience in account-

[2] Mr. Holland's job was expanded to include several more cities.

ing with the Company, and only one year of experience in managing operations.

Plaintiff has produced a list of managerial employees who were terminated in the Western Region after Mr. Aikman returned from the Dallas meeting in

[9]

February 1977. (Exhibit 6). Mr. Aikman, on cross-examination, admitted that, although many other employees were discharged in his region, these seven were the only ones in the higher management levels that were discharged in the initial reorganization of the Western Region. Each of the seven managerial employees, including plaintiff, is between the ages of sixty and sixty-five. None of these seven were employed in other jobs with the Company. Plaintiff had difficulty in obtaining additional information about the ages of employees fired in the reorganization, but this list is strong evidence that age was a factor, at least in the decision on which managerial employees in the Western Region were to be fired or forced into retirement.

Additional evidence was offered by the plaintiff concerning the eighteen Area General Manager positions that were reduced to nine such positions in the reorganization. While this evidence is not nearly as strong as the evidence concerning just the Western Region managerial employees, it offers some support to plaintiff. Of the eighteen Area General Managers before the change, five were between the ages of sixty and sixty-five. None of these five were allowed to stay as Area General Managers, with the exception of Mr. Hylton, who stayed until the end of the year when he retired at sixty-five, and was replaced by Stan Friedon, age 32. As to the other four former Area General Managers over sixty, two were offered

[10]

and accepted other jobs, although presumably such jobs were lower in the Company heirarchy, and the other two, plaintiff and C. C. McClendon, age 61, were terminated without offers of further employment. (See exhibits 13 and 18).

It is well established that the burden of proof is on the plaintiff to establish a violation of the Act by a preponderance of the evidence. *Gill v. Union Carbide Corp.*, 368 F.Supp. 364 (E.D. Tenn. 1973). After considering all the evidence and observing all the witnesses, the Court is convinced and finds that the preponderance of the believable evidence demonstrates that age was a determinative factor in defendant's decision to force the plaintiff to retire at age sixty-one. Therefore, defendant violated the Age Discrimination in Employment Act of 1967.[3]

Remedies for Unlawful Age Discrimination

Plaintiff is able and available for work. He has vigorously sought employment since his forced retirement on March 31, 1977. With one exception, a six week job as a travel consultant, he has been unable to find employment.

Plaintiff has lost approximately ten months employment at $2,725.00 per month, or $27,250.00. During the same period he received $5,031.16 in severance pay, $1,200.00 from other employment, and $4,039.80 in retirement

---

[3] The Court has previously ruled that defendant's retirement plan did not fall under the exemptions of 29 U.S.C. § 623(f)(2).

[11]

benefits. Plaintiff is entitled to a judgment for the balance of $16,979.04, plus such additional amount as he would have earned through the date of his reinstatement, less amounts to which defendant would be due a credit.

Plaintiff is entitled to reinstatement to such employment with the defendant as is reasonably equivalent to his former position, and the defendant is directed to offer plaintiff such reinstatement.

The plaintiff is entitled to recover reasonable attorney's fees, the amount of which the parties will resolve, or failing therein, the Court will fix the attorney's fees.

The Court disallows liquidated damages as the Court does not find that defendant's actions were willful.

Order Accordingly.

/s/ ROBT. L. TAYLOR
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

FILED
FEB 1, 1978

JAMES F. CARPENTER	)	
	)	
v.	)	CIV. 3-77-377
	)	
CONTINENTAL TRAILWAYS	)	

ORDER

For the reasons indicated in a memorandum opinion this day passed to the Clerk, it is ORDERED that defendant pay a judgment to the plaintiff in the amount of $16,979.04, plus such additional amount as he would have earned through the date of his reinstatement, less amounts to which defendant would be due a credit.

It is further ORDERED that defendant offer reinstatement to the plaintiff in a position which is reasonably equivalent to his former job.

It is further ORDERED that plaintiff recover reasonable attorney's fees, the amount of which the parties will resolve, or failing therein, the Court will fix the attorney's

[2]

fees.

The Court disallows liquidated damages as the Court does not find that defendant's actions were willful.

Enter:

/s/ ROBT. L. TAYLOR
United States District Judge

APPENDIX C

29 U.S.C.A.:

§621. CONGRESSIONAL STATEMENT OF FINDINGS AND PURPOSE

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Appendix C - 29 U.S.C.A. §623

§623. PROHIBITION OF AGE DISCRIMINATION

(a) It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge an individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * *

(f) It shall not be unlawful for an employer, employment agency, or labor organization --

* * *

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual;

* * *

(f) It shall not be unlawful for an employer, employment agency, or labor organization--

* * *

(2) to observe the terms of a bona fide seniority

system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual;

* * *

As amended Pub.L. 95-256, §2(a), Apr. 6, 1978, 92 Stat. 189.

highlights
of
our new

RETIREMENT PLAN

for eligible employees of

Continental Trailways

a regular income from Continental Trailways new RETIREMENT PLAN

One of our goals is to help assure retirement security for long-service employees. Members of our new Retirement Plan share in this goal and can look forward to a regular income when they end their careers with Continental Trailways.

This folder describes the key features of the Plan, such as, when you are eligible for benefits, how benefits are figured and who pays for the Plan. If you have any questions after you read it through, please get in touch with a member of the Personnel department for the answers you need.

HOW MUCH THE PLAN PAYS

Our new Retirement Plan and Social Security together give you the foundation for a secure and satisfying retirement income — an income you can't outlive.

Your benefits from Social Security serve as a starting point in determining how much retirement income the Plan can provide. To find this income, the Plan formula uses a pension base —

> **Pension Base:** the difference between hi-5 pay and primary Social Security

Hi-5 pay in the monthly average of your highest paid five in a row during your last 10 completed calendar years of service. Pay includes your regular earnings and any overtime.

If you retire before 1977, hi-5 pay will be the average of your completed calendar years after 1971.

Primary Social Security refers to your benefit only and does not include benefits for dependents.

When you are eligible for a pension the monthly amount will be figured by this formula:

Pension Base x 1-1/4% x service

WHEN YOU GET BENEFITS

You can retire with a full normal pension after you reach age 65, or you can retire with a reduced early pension after age 55 and 15 years of service.

Should you become totally and permanently disabled after 15 years of service, your pension will start at age 65. Benefits will be based on all the years you couldn't work, as well as those you did.

HOW PAYMENTS ARE MADE

Once your pension begins it will be paid as long as you live with payments stopping at your death. However, if you wish to share your pension with your wife, husband or other dependent, you can arrange for a Survivor Option before you retire.

Under a Survivor Option you get smaller monthly checks so your beneficiary can get a lifetime income at your death after retirement.

Those who are eligible for retirement — normal or early — should elect their options before April 1, 1974. After that date, you will need to elect your option before the two-

year period preceding retirement. Otherwise it will require Committee approval and you may also have to show proof of good health.

MEMBERSHIP IN THE PLAN

You are eligible for membership right now if you are a salaried or clerical employee and will have a year or more of regular full-time employment January 1. If you enroll before January 1, you receive pension credit for all continuous service with Continental Trailways. Otherwise pension credit can begin only from the January 1 you enroll. Employees hired after January 1, 1974 who are over age 50 are not eligible for membership.

SHARING THE COST

If you join when first eligible, Continental Trailways pays the whole cost of past service credit for your service before January 1, 1974, the date the Plan starts.

For service after January 1, we share the cost with you. Your share amounts to:

2% of pay up to Social Security tax base, plus
4% of pay over Social Security tax base

Tax base refers to the earnings you pay Social Security taxes on. At present the tax base for 1974 is $12,600 but it may go up to $13,200 sometime during the year.

The Company expects to put in a dollar for every dollar members put in — in addition to paying for past service benefits and sharing the cost of Social Security.

When you retire, your regular monthly checks from the Plan could total many times your own contributions. For example, on a pension of $100 a month, a man age 65 could expect checks totaling about $18,000. A woman the same

age could collect around $22,000 since she's expected to live about three years longer.

If you leave before you are eligible for benefits your contributions will be returned to you plus interest.

THE OFFICIAL DOCUMENT

This folder highlights Continental Trailways' Retirement Plan as it applies in normal situations and does not replace the official document. A copy of the Plan and the Department of Labor D-1 Supplement will be available for inspection during normal working hours in the Personnel Office. This plan does not apply to employees covered by a collective bargaining agreement under which a retirement plan has been negotiated.

GOVT.
Civil PLTF. EXHIBIT 44
Crim._____ DEF.
UNITED STATES DISTRICT COURT
v
Stanley K. Ford, Official Reporter

Trailways

Continental Trailways Retirement Plan

Employee Booklet

You Can Read About	On Page
TYPE OF PLAN	1
PLAN MEMBERSHIP	1
SERVICE CREDIT	4
RETIREMENT TIMES	9
PENSION AMOUNTS	11
HOW BENEFITS ARE PAID	14
OTHER PAYMENT OPTIONS	15
NORMAL RETIREMENT PENSIONS	16
EARLY AND DEFERRED VESTED PENSIONS	18
DISABILITY RETIREMENT	21
OTHER BENEFITS FOR YOU OR YOUR SURVIVORS	23
PLAN OPERATION	27
PLAN DIRECTORY	34

TYPE OF PLAN

The Plan is a defined benefit pension plan. This means that the benefit you will receive is determined by a formula rather than depending on amounts contributed in your behalf.

PLAN MEMBERSHIP

This Plan is for salaried and clerical employees of Trailways, Inc., who had not attained age 60 at date of employment. If you are eligible to participate in a Plan for union

employees or in the Plan for nonunion hourly employees, you cannot participate in this Plan.

If you were hired after January 1, 1974, participation is mandatory. You will automatically become a participant on the January 1 or July 1 after completing one year of Eligibility Service.

If you were hired before January 1, 1974, participation is voluntary. You will be eligible to participate on the January 1 or July 1 after completing one year of Eligibility Service. If you reject participation but later wish to participate, you may apply to the Retirement Committee for inclusion. If approved participation will begin on the next January 1 or July 1 following approval. You will receive no Vesting Service or Benefit Service for the period during which you declined to participate in the Plan.

* * *

-8-

Vesting Service under <u>both</u> plans, you qualify for a pension from this Plan -- based on your years of Benefit Service, and earnings <u>before the transfer</u>. On the other hand, if you leave with a total of less than 10 years' Vesting Service under both plans, you receive your contributions, plus interest, from this Plan

If you become eligible for this Plan due to your transfer
from a non-covered to a covered position, or
from Trailways, Inc. or a subsidiary, while
a member of that company's pension plan,
your membership in this Plan will start on the first day of the month coinciding with or next following your date of transfer.

Upon transfer, your employment before and after the transfer counts toward Eligibility Service, Vesting Service, and Benefit Service. However, only your Benefit Service and pay after the transfer counts in figuring your monthly pension from this Plan.

-9-

RETIREMENT TIMES

While it's true that the longer you work the higher your benefits will be, you may want -- or need -- to retire or leave before your normal retirement date. For this reason, the Plan offers a number of different retirement possibilities and pensions, as follows:

Normal retirement is the first day of the month on or after your 65th birthday. Pension payments begin immediately.

Early retirement can be any time after age 55 when you also have 10 years or more of Vesting Service. Pension payments begin at age 65 in the full amount earned to retirement. Or reduced benefits can begin as early as the first day of the month following age 55 by requesting the Retirement Committee for early payment.

Disability retirement can occur if you become totally disabled after you have 10 years of Vesting Service. Pension payments begin at age 65.

You qualify for a deferred vested pension if you leave the Company after you have 10 years of Vesting Service but before

-10-

you are eligible for early retirement. Pension payments begin at age 65, or reduced benefits can begin as early as

the first day of the month following age 55 by requesting the Retirement Committee for early payment.

If you leave the Company with less than 10 years of Vesting Service, you will not qualify for a pension. But you will receive a lump sum return of your personal Plan contributions, plus interest:

-11-

PENSION AMOUNTS

Your pension is determined through the use of two independent formulas, your Basic Pension Formula and your Minimum Pension Formula.

Basic Pension Formula

Your pension amount figured from the formula below provides a basis for all forms of payment available under the Plan. For this reason, we call it your "basic" monthly pension amount.

Later pages tell you how the formula amount is adjusted if an early or deferred vested pension begins before age 65, or if monthly benefits may be payable to your spouse after your death.

1 1/4% x Final Average Compensation x Benefit Service, minus

1 1/4% x Primary Social Security Benefit x Benefit Service.

Compensation for figuring benefits means your total earnings, excluding any discretionary bonuses.

Final Average Compensation means the result obtained by

dividing your Compensation during the five consecutive completed calendar years out of the last ten completed calendar years of employment in which Compensation was highest by 60.

* * *

80-1578
No. _____

FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES F. CARPENTER,

Petitioner

v.

CONTINENTAL TRAILWAYS,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Did the Sixth Circuit Court of Appeals err in concluding that Trailways' retirement of Mr. Carpenter in 1977 was permitted by Section 4(f)(2) of the Age Discrimination in Employment Act (ADEA) of 1967 [29 U.S.C. §623(f)(2)], as written at that time?

CORPORATION LIST

Defendant's relationship with Holiday Inn, Inc. ceased in 1979. Defendant's proper name now is Trailways, Inc.; its parent is New Trails, Inc..

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW.....	i
CORPORATION LIST.....	i
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE CASE.....	2
FACTS.....	2
THE WRIT SHOULD NOT BE GRANTED.....	4
A. There Is No Conflict Among The Circuit Courts.....	4
B. There Is No Important Question Of Federal Law To Be Addressed.....	8
C. There Is No Conflict With An Applicable Decision Of This Court.....	10
CONCLUSION.....	11

TABLE OF AUTHORITIES

PAGE

Benzel v. Valley National Bank of Arizona, 633 F.2d 1325 (9th Cir. 1980).... 6

E.E.O.C. v. Baltimore and Ohio Railroad Company, 632 F.2d 1107 (4th Cir. 1980).... 6

General Talking Picture Corp. v. Western Electric Co., 304 U.S. 175 (1938)..... 9

Marshall v. Hawaiian Telephone Co., 575 F.2d 763 (9th Cir. 1978)..... 4

N.L.R.B. v. Pittsburgh Steamship Co., 340 U.S. 498 (1951)..... 9

Sexton v. Beatrice Foods Co., 630 F.2d 478 (7th Cir. 1980)..... 6

United Airlines, Inc. v. McMann, 434 U.S. 192 (1977)..... 8

United States v. ITT Continental Baking Co., 420 U.S. 223 (1974)..... 9

Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978)..... 4

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, Continental Trailways, opposes the issuance of a Writ of Certiorari to review the Judgement entered by the United States Court of Appeals for the Sixth Circuit on December 18, 1980, in Case No. 78-1278, styled James F. Carpenter, Plaintiff-Appellee v. Continental Trailways, Defendant-Appellant,

and urges the Court to deny the Petition filed by Mr. Carpenter. 1/

STATEMENT OF THE CASE

FACTS

The final section of the "Highlights Of Our New Retirement Plan" brochure received by Plaintiff in 1974 or 1975 (J.A. 11) 2/ was entitled "THE OFFICIAL DOCUMENT" and provided as follows:

> This folder highlights Continental Trailways' Retirement Plan as it applies in normal situations and does not replace the official document. A copy of the Plan and the Department of Labor D-1 Supplement will be available for inspection during normal working hours in the Personnel Office... (emphasis supplied). 3/

1/ The parties are referred to herein as follows: Petitioner as Plaintiff or Mr. Carpenter; Respondent as Defendant or Trailways.

2/ "J.A." refers to the printed joint appendix filed in the Sixth Circuit.

3/ See page A-28 of Mr. Carpenter's Petition.

The retirement plan provided, in pertinent part:

> A Participant shall be eligible for an early Retirement Pension if his employment with the Employers is terminated, whether at his own option or not, on or after his 55th birthday and before his Normal Retirement Date, provided he has completed ten (10) or more years of Vesting Service...(emphasis supplied)

As set forth above, the final section of the "highlights" brochure received by Plaintiff specifically stated that the highlights contained therein did not replace the actual retirement plan, which was available for inspection in Defendant's Personnel Office. 4/ Furthermore, it reasonably cannot be expected that such a brochure would mention or explain all of the provisions of a lengthy retirement plan. Accordingly, Plaintiff cannot claim that Trailways "misrepresented" the provisions of its plan to him.

4/ There was no evidence that Plaintiff ever was denied access to the Plan or that he ever asked for a copy.

THE WRIT SHOULD NOT BE GRANTED

A. There Is No Conflict Among The Circuit Courts

On the basis of the facts in the record before it, the Sixth Circuit Court of Appeals concluded that Defendant's retirement plan permitted retirement at the option of either Trailways or the employee at any time after the employee reached the age of fifty-five (55). The Court further concluded that, for the purpose of the §4(f)(2) exception to the ADEA, there was no meaningful distinction between mandatory and optional early retirement plans, in accord with decisions rendered by the Third and Ninth Circuits. 5/ Finally, the Court concluded that Defendant "acted as permitted by its retirement plan," that it did not violate the provisions of that plan, and that, therefore, "in exercising its option to

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5/ Marshall v. Hawaiian Telephone Co., 575 F.2d 763 (9th Cir. 1978); Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978).

retire [Mr.] Carpenter, Trailways 'observed the terms' of the plan as required by §4(f)(2)."

With respect to Plaintiff's contention that Defendant's plan was a "subterfuge," the Court again analyzed the facts in the record before it and determined that the plan was not adopted as a "stratagem or artifice to evade the requirements of the ADEA." To the contrary, the Court concluded that the plan was a "legitimate instrument." Regarding the same "subterfuge" issue, the Court also rejected Plaintiff's claim that Defendant had misrepresented or concealed the terms of its plan to the employees. 6/ On the basis of the above findings and conclusions, the Court held that Defendant's retirement plan satisfied the criteria necessary for exemption under §4(f)(2)

6/ It should be noted that the "Highlights" brochure specifically stated that the actual retirement plan was the controlling document and that such was available to the employees.

and that Mr. Carpenter's retirement pursuant to that plan was not violative of the ADEA.

Plaintiff contends that the decision of the Court below is in conflict with decisions from the Fourth, Seventh, and Ninth Circuits. 7/ Defendant submits that those decisions are inapposite to that of the Sixth Circuit and that, therefore, no decisional conflict among the Circuits exists.

Thus, in each of the cases cited by Plaintiff as "conflicting," the respective Court concluded that the plan involved contained no provision permitting the employer to involuntarily retire the employee prior to age sixty-five (65). 8/ Accordingly, each Court concluded that the §4(f)(2) exemption did not

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7/ Benzel v. Valley National Bank of Arizona, 633 F.2d 1325 (9th Cir. 1980); E.E.O.C. v. Baltimore and Ohio Railroad Company, 632 F.2d 1107 (4th Cir. 1980); Sexton v. Beatrice Foods Co., 630 F.2d 478 (7th Cir. 1980).

8/ 633 F.2d at 1327; 632 F.2d at 1110; 630 F.2d at 485.

apply and that the ADEA had been violated. In the instant case, however, the Sixth Circuit concluded that there was such a provision in Defendant's plan, which was not concealed from the employees, and that Defendant acted in accord therewith when it involuntarily retired Plaintiff. Accordingly, the Court held that the §4(f)(2) exemption applied and that the ADEA had not been violated.

The above makes clear that the "conflict" alleged by Petitioner does not exist. Furthermore, even assuming that there is a "conflict," it is not one which warrants the Supreme Court's attention because the 1978 amendments to §4(f)(2) of the ADEA settled the entire issue of whether involuntary retirements were permitted. 9/ In these circumstances, therefore, the instant case does not warrant this Court's attention.

9/ Such retirements on the basis of age now are prohibited. See pages A-22 and A-23 of Mr. Carpenter's Petition.

B. There Is No Important Question Of Federal Law To Be Addressed

As hereinbefore noted, §4(f)(2) of the ADEA was amended in 1978 to prohibit age-motivated, involuntary retirements, regardless of whether they were mandatory or optional. That amendment overruled this Court's decision in United Airlines, Inc. v. McMann, 434 U.S. 192 (1977), which held that the ADEA did not prohibit early retirement pursuant to a mandatory retirement provision in a *bona fide* plan, even if age was the sole basis for that action. It also answered the question not addressed by this Court in McMann, i.e., whether the same result would obtain if the retirement provision were optional. In light of this Congressional action, which occurred in 1978, the issue of age-motivated, involuntary retirements and the ADEA has been resolved, and cases such as the instant one cannot recur. Accordingly, there is no impor-

tant question of federal law to be addressed by this Court.

Moreover, the Sixth Circuit's opinion was based on its analysis and interpretation of the facts involved in this case. Thus, based on the evidence, it concluded that the terms of Defendant's retirement plan permitted Defendant to retire Plaintiff, that Defendant acted in accord with its plan, and that the plan was not a "subterfuge." Plaintiff's complaints regarding those conclusions, which appear throughout his Petition, do not make this case one involving an "important" federal question. To the contrary, it is well established that this Court will not review decisions from lower courts which are based on factual determinations. N.L.R.B. v. Pittsburgh Steamship Co., 340 U.S. 498, 503 (1951); General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178-179 (1938); *see* United States v. ITT Continental Baking Co., 420 U.S. 223, 226-227, footnote 2 (1974).

C. There Is No Conflict With An Applicable Decision Of This Court

It is undisputed that this Court never decided the question of whether a retirement pursuant to an optional early retirement provision was permitted by §4(f)(2) of the ADEA. Accordingly, there can be no conflict between the Sixth Circuit's decision and a decision of this Court on that issue.

Plaintiff asserts that the Sixth Circuit's finding of no misrepresentation or concealment by Defendant regarding its retirement plan is in conflict with this Court's definition of "subterfuge." However, a review of that portion of the Petition supporting the assertion reveals that Plaintiff is not alleging that the instant case is one where the Sixth Circuit failed to follow clear Supreme Court precedent. To the contrary, his exclusive concern is with the aforementioned factual conclusions on the "subterfuge" issue made by the Sixth Circuit, which were adverse

to his interests. Clearly, such a complaint is not sufficient to warrant review by this Court.

CONCLUSION

For all of the reasons stated above, Defendant submits that Plaintiff's Petition fails to satisfy any of the criteria established by this Court for exercising its discretion in favor of reviewing a lower court's decision. Accordingly, Defendant urges this Court to deny the Petition For Writ of Certiorari filed in this case by Plaintiff.

Respectfully submitted,

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April 16, 1981